SUPREME COURT, U. S.

No. 539

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., *et al.*,

Appellants,

v.

MIDDLEWEST MOTOR FREIGHT BUREAU, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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In the

Supreme Court of the United States

October Term, 1969

The National Small Shipments Traffic Conference, Inc., *et al.*,

Appellants,

v.

Midwest Motor Freight Bureau, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota, Fourth Division

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APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

A motion to dismiss has been filed by government parties (United States and Interstate Commerce Commission) solely on jurisdictional grounds. A motion to dismiss and or affirm has been filed by the carrier-appellees on grounds of jurisdiction and substantiality. This response is directed to both motions.

1. The Basis For This Appeal

An issue of utmost consequence in the regulation of carriers is in danger of being submerged by a morass of procedural detail. The tangle of procedural events can scarcely be said to have been unravelled by appellees' restatement of the question (p. 2, appellees' brief) or by

mission's order by declining to rule on the merits of the complaint so as to fix the carriers' liability for restitution and the injunction bond. The case was set for hearing on the merits on July 9, 1968. It was briefed, tried, and argued on the merits that day. A decision by the three-judge court affirming the Commission's order would have made way for subsequent resolution by a one-judge court, of issues raised by counterclaim respecting injunction bond and restitution. But a decision on the merits of the complaint, the three-judge court did not make. Instead, it undertook an adjudication of the counterclaim. The difficulty was not merely that the protocol established by *Brotherhood*[*] was thereby infringed. The underlying problem was that, while the court had before it a full record for adjudication of the complaint on the merits, *no record* had been made by the parties for adjudication of the counterclaim. Such data as the court had before it was so fragmentary and incomplete as to preclude findings of fact, to say nothing of an evaluation of equities necessary for definitive judgment of the merit of the counterclaim. This deficiency was the source of a profound misconception as to the purport of the Commission's order of postponement dated September 30, 1965, in light of certain rate increases effective November 16, 1965. These increases were viewed by the court as "approved" by the Commission (J.S. 16a). Hence, it concluded, the rate increases collected by the carriers from September 13 to September 30, 1965 (when the Commission's order of cancellation lay under court restraint) "should not be considered unjust and unreasonable by this court". In point of fact, the November 16th increases were *not approved* by the Commission. They were ordered investigated when published to determine whether they were just and reasonable. They were subsequently modified by the carriers

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[*] Public Service Commission v. Brotherhood Freight Lines, 312 U. S. 621 (1940).

The modification was suspended and ordered investigated by Commission order. The proceedings were then consolidated for investigation and it was not until April 4, 1967, that the Commission issued an administratively final order discontinuing the investigation.

Events attending the November 16, 1965 increases repel the inference that they were "approved" by the Commission. Yet, it was from something as equivocal as the November 16th increases standing alone that the court formed the conclusion that the increases charged from September 13 to September 30, 1965, were "not unjust and unreasonable". This conclusion was reached in the face of: (1) a Commission order directing cancellation of these rates as not shown just and reasonable; (2) the Commission's explicit statement that by its postponement order of September 30, 1965, it did not approve or prescribe the higher rates from September 13th (J.S. 13a); (3) a formidable body of decisional authority precluding retroactivity such as would make it possible for an order entered September 30, 1965—by word or deed—to take effect from September 13, 1965.* The 1968 decision of the district court held the Commission's order of September 30th to be effective *nunc pro tunc* from September 13th. In its 1969 decision, it receded from *nunc pro tunc* language. But it continued to impart a retroactive effect to the Commission's order. This is articulated in the 1969 decision (J.S. 14a-15a):

> "Certainly, the Commission had authority to continue the challenged rates in effect from Septem

* United States v. Baltimore & O. R. Co., 284 U. S. 195, 203 (1931); Brimstone R. & C. Co. v. U. S., 276 U. S. 401, 122; Erie R.R. Co. v. Alabama & V. Ry. Co., 173 I.C.C. 563, 567; Bell v. United States, 49 F. Supp. 505 (1943).

> ber 13 to September 30, 1965, although the term 'nunc pro tunc' as used by this court in its order of September 5, 1968, may be inappropriate and may be stricken."

The view that the Commission had authority *by order issued September 30, 1965*, to continue the challenged rates in effect from September 13 to September 30, cannot coexist with the decisions cited above.

Inland Steel v. *United States*, 306 U. S. 153 (1939) speaks directly to these points. It deals with judicial review of agency action and specifically with enforcement of conditions imposed in granting injunctive relief. It passes on the effect of an I.C.C. order postponing the effective date of a Commission cease and desist order that was under court review. Finally, it is a decision of this Court which accepted on direct appeal from the district court an issue relating solely to equitable restitution. Appellants here do not seek adjudication of their claim for restitution but only that the court below perform the function for which it was convoked by deciding on the merits of appellees' complaint. As in *United States* v. *I.C.C.*, 337 U. S. 426, 466 (a direct appeal made to and accepted by this Court involving the issue of reparation), appellants here seek the relief there granted:

> "Since the district court did not pass on the merits of the allegations of the complaint, the cause is remanded to it for that purpose."

2. The Government's Motion to Dismiss.

The first barrier to jurisdiction set up by the government's brief is a syllogistic argument: as the Commission order that was enjoined concerned an increase later superseded by a second increase (November 16, 1965), the Commission's order could no longer be "enforced"; there

was nothing to enjoin; nothing from which to appeal. So woodenly literal an argument will not commend itself to this Court. One need not, however, explore the imperfections of its logic and rationale. A basic factual error condemns the argument. The error is found in the reference to the November 16th increase. The government states (p. 3):

> "After the Commission found on a new record that the November 16, 1965 rates were just and reasonable, the carriers successfully moved the district court to dismiss this suit as moot . . ."

At no time did the Commission find on a new record or on any record that the November 16, 1965 rates were just and reasonable. Nothing illustrates as vividly the mischief wrought by adjudication without a record as the error into which the government parties have strayed, presumably as a consequence of references in the opinions below to the November 16th increases. The facts are these:

The increases ordered cancelled by the Commission in the order that is the subject of this action were 5% in less-truckload rates and 30¢ in minimum charges. The rate action effectuated November 16, 1965 was an increase in per shipment charges of $1 and in minimum charges of $1. These increases were ordered investigated by the Commission. No hearing was ever held and that investigation eventuated in no findings as to the reasonableness of the increased per shipment charges. On May 1, 1966, the $1 per shipment increases were converted to rate increases. *These were suspended by the Commission* and investigation was consolidated with that previously ordered with respect to the November 16th increases.

the per shipment charges previously dealt wi
verted to class rates. The Commission susp
increases with respect to shipments weighing
pounds. On appeal, Division 2 of the Com
pended increases with respect to shipments
pounds. At a later date, the suspensions w
and ultimately (April 4, 1967) an administr
order discontinuing the investigation wit
Commission. At no time did the Commission
finding that the November 10, 1966 increas
and reasonably. Indeed those increases were
subsequent increases that were suspended
revenue must be exactly contrary to the "reas
able" characterization found in the governin

The history of the November 1966 increase
notion that the Commission placed the stam
proval on them and the hypothesis that th
reached and fostered the order of cancellat
are built in practice on the fiction of unwitt
feat such speculation. For example, the C
articulation that only time has been inade
spective elements of the order stand out. F
Commission's statement that the rates prote
shall initially be cancelled and then some
back in Commission abandons efforts at c
idea that economic or other reasons rejected
heard as to the advisability of cancellation
Commission's order of cancellation.

But more than this, the history of the No
increases provides an effective refutation
denial of an interlocutory examination of
the Commission's order of cancellation [illegible]

ing order and denial of an interlocutory injunction are not final judgments of the reviewing court on the merits. The carriers here were complaining of the Commission's new standards of proof in motor carrier revenue cases. Those issues clearly extend beyond the precincts of a single rate proposal. They survive compliance with the Commission's order to cancel. Indeed, resolution to the carriers' satisfaction of the issues raised in this case with respect to standards of proof would have served their purposes well in succeeding investigations such as the November 16th increase investigation, then in full sway. No necessary inference of mootness arises from denial of interlocutory restraint followed by compliance with an order of cancellation. This was demonstrated in *Accelerated Transport-Pony Express* v. *United States*, 227 F. Supp. 815, aff'd per curiam, 379 U.S. 4 (1964). In that case after dissolution of the restraint on the Commission's order, the carriers complied and continued to prosecute the appeal; the three judge court subsequently handed down its decision on the merits; the carriers appealed to the Supreme Court which accepted jurisdiction and affirmed the judgment below.

The government's brief now puts forward a new argument: the counterclaims for restitution and recovery on the injunction bond should indeed have been reserved for determination by a single district judge. But what difference did it make—"the fact that three judges rather than one did consider the question raises no serious problem." Raises no serious problem indeed! Counterclaim for restitution was summarily dismissed and injunction bond peremptorily discharged without benefit of a record; with no opportunity for the shipper appellants to document their counterclaim by probative evidence. The sequence obtained by *Brotherhood* is explained by the government by quoting *United States* v. *I.C.C.*, supra, which states the

policy as one "of limiting the three-judge court procedure within its expressly stated confines." Appellants suggest that *Brashear* stated the policy more pungently: "The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called." The Court cast doubt on the propriety of dismissal of the counterclaim without a hearing on the merits, 312 U.S. 621, 626-627. It seems apt to observe that *Brashear* was decided in 1941. A derangement in the sequence of adjudication, tolerated in a case of first impression, should not find favor with the Court 28 years afterwards. The admonitions and cavcats uttered by the *Brashear* court merit more than the cavalier treatment suggested in the government's brief. Appellants suggest that the judgment of the Court in *United States* v. *I.C.C.*, *supra*, dispositive of the problem there presented, is appropriate for disposition of the instant case—remand to the district court for adjudication of the merits of the complaint.

This supplies the answer too, to the contention that the issue on which the appeal is based, is not so much the ruling on the complaint, as the ruling on the counterclaim. The appellants are of course concerned that a case briefed, argued, and heard on the merits of the complaint should have terminated in a decision on issues not yet heard, and tried in an evidentiary forum. Nevertheless, appellants do not seek from this Court, at this time, a disposition of issues arising under the counterclaim, no more than they sought such a determination from the three-judge court below.* Appellants seek only a judgment on the merits of the complaint.

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* In their brief to the three-judge court, dated November 12, 1965, appellants (intervenors below) stated (p. 7): "Intervenors have not yet moved for recovery under the indemnity bond or for judgment on the counterclaim . . . both rights are enforceable through the ancillary jurisdiction of this Court by resort to a single judge after a determination on the merits of the complaint by the three-judge court."

Finally, the government speculates as to what the position of the carriers would have been, had the court below ruled in appellant's favor on the constitutional issue. Appellees suggest that such a ruling could not have been made without first considering the complaint on the merits. From such a judgment of dismissal, the carriers remedy would only be to this Court on direct appeal. And, if the government's point is that the appellees themselves sought dismissal of the complaint and thus could not appeal therefrom, the answer must be that the appellees sought only dismissal without prejudice and expressly opposed a dismissal of the complaint on the merits. In that posture, their right to appeal to this Court from a judgment of dismissal on the merits would stand unimpaired. Appellees sought only a judgment ruling that the District Court on the merits of the complaint. It is respectfully suggested that the court below abused its discretion in declining to rule on the merits of the complaint and by dismissing the proceeding without prejudice to the plaintiff carriers. From such a judgment direct appeal lies only to this Court.

I. Appellees' Motion to Dismiss and to Affirm

CONCLUSION

Appellants suggest that this court has jurisdiction of the appeal and that its substantiality is such as to warrant notation of probable jurisdiction. The motions of the government parties to dismiss and of the appellees to dismiss and/or affirm, should be, in all respects, denied.

Respectfully submitted,

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